Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

LOUISE J. HAMLET,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

APPENDIX

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January 19, 1996

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United States Court of Appeals for the Federal Circuit

94-5118

LOUISE J. HAMLET,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

On Appeal from the U. S. Court of Federal Claims
in Case No(s). 281-86C
This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

Entered by Order of the Court

DATED: Aug. 17, 1995

/s/
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: November 3, 1995

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on November 3, 1995.

Dated: October 27, 1995

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

By /s/
Diane M. Frye
Chief Deputy Clerk

United States Court of Appeals for the Federal Circuit

94-5118

LOUISE J. HAMLET,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: August 17, 1995

Before ARCHER, Chief Judge, MICHEL and CLEVENGER, Circuit Judges. CLEVENGER, Circuit Judge.

Louise J. Hamlet appeals from the judgment of the United States Court of Federal Claims[1] dismissing her action for lack of jurisdiction. Hamlet v. United States, No. 281-86C (Fed. Cl. Mar. 23, 1994). We affirm.

I.

Since the pertinent facts in this case are set forth in detail in Hamlet v. United States, 14 Cl. Ct. 62, 63-64 (1988) (CFC Hamlet I), and in Hamlet v. United States, 873 F.2d

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[1] Effective October 29, 1992, the United States Claims Court became the United States Court of Federal Claims. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, §902(a), 106 Stat. 4506, 4516. Although Hamlet initiated her action in the Claims Court in 1986, we refer to the trial court by its current name.

1414, 1415 (Fed Cir. 1989) (CAFC Hamlet I), only a summary of the facts is necessary.

Hamlet was employed as a program assistant in the Charlotte County, Virginia office of the Agricultural Stabilization and Conservation Services (ASCS) from November 19, 1956, until her removal on November 4, 1985. This ASCS county office, like all such offices, operated under the aegis of the United States Department of Agriculture (USDA) as set forth in the ASCS organic statute, the Soil Conservation and Domestic Allotment Act, Pub. L. No. 46, 49 Stat. 1148 (1935) (codified as amended at 16 U.S.C. §590h (1988)).

After her removal, Hamlet requested and received appeal hearings before the Virginia State ASCS Committee and the National ASCS office. Her removal was upheld. Subsequently, on May 5, 1986, Hamlet filed suit in the Court of Federal Claims, claiming that she was entitled to relief under the Tucker Act, 28 U.S.C. §1491(a)(1) (1988 & Supp. V 1993).[2] She alleged that her removal (1) violated her rights under the First and Fifth Amendments of the U.S. Constitution; (2) breached her employment contract; and (3) did not comply with the rules and regulations of the USDA and ASCS rules found in the ASCS handbook: County

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[2] The Tucker Act states, in pertinent part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Office Personnel Management, 22-PM (Rev. 1) (1985) (22-PM Manual). Hamlet sought reinstatement and backpay.

The Court of Federal Claims dismissed Hamlet's action for lack of subject matter jurisdiction and for failure to state a claim. CFC Hamlet I, 14 Cl. Ct. at 67-68. This Court vacated the judgment of the Court of Federal Claims and remanded the case "for further consideration or for trial." CAFC Hamlet I, 873 F.2d at 1417. We held that, under United States v. Hopkins, 427 U.S. 123 (1976), Hamlet's claim for breach of contract was sufficient under the Tucker Act to withstand a motion to dismiss for lack of jurisdiction, reasoning that Hamlet might be able to prove facts entitling her to relief based on her allegations that an implied-in-fact contract had been created by the 22-PM Manual provisions covering her employment and that this contract was breached as a result of her removal. CAFC Hamlet I, 873 F.2d at 1417. We also held that the Court of Federal Claims erred in dismissing Hamlet's regulatory claim for reinstatement and backpay since the court did not consider the 22-PM Manual provisions governing her employment. Id. We further held that Hamlet's constitutional claim should not have been dismissed because, unlike the situation in United States v. Connolly, 716 F.2d 882 (Fed. Cir. 1983) (*en banc*), cert. denied, 465 U.S. 1065 (1984), where the plaintiff's claim was based solely on the First Amendment, Hamlet relied additionally upon the backpay, compensation and reinstatement rights contained in the 22-PM Manual. CAFC Hamlet I, 873 F.2d at 1416-1417.

Upon remand, the Court of Federal Claims conducted an initial proceeding concerning the implied-in-fact contract issue on February 14, 1992, and held a trial on the merits on July 13, 1992. After Hamlet presented her case, the

Government moved to dismiss the action. The Court of Federal Claims dismissed the action, holding that (1) Hamlet did not prove that an express or implied contract, if one existed, had been breached; (2) Hamlet did not prove that the 22-PM Manual regulations had been violated; and (3) she did not prove that her constitutional rights were violated by any government policies or procedures. Hamlet v. United States, no. 281-86C, slip op. at 4-5 (Cl. Ct. Oct. 2, 1992) (CFC Hamlet II). After her motion for reconsideration was denied, Hamlet again appealed to this court. This court explained that the Government's motion to dismiss was actually a motion under Rule 52(c) of the Rules of the United States Claims Court and, therefore, the Court of Federal Claims was required to make adequate findings of fact and conclusions of law to support its judgment. This court vacated and remanded the case because the Court of Federal Claims' "findings of fact and conclusions of law [were] insufficient to enable meaningful appellate review." Hamlet v. United States, No. 93-5075, slip op. at 2 (Fed. Cir. Nov. 23, 1993) (CAFC Hamlet II).

Upon remand, the Court of Federal Claims held that Hamlet did not satisfy her burden of proof in establishing the existence of a contract of the breach of that contract. Hamlet v. United States, No. 281-86C, slip op. at 4 (Fed. Cl. Mar. 21, 1994) (CFC Hamlet III). The court also held that the 22-PM Manual does not have the "force and effect of law" under Chrysler Corp. v. Brown, 441 U.S. 281 (1979), and thus could not be interpreted to mandate the payment of money damages for purposes of the Tucker Act, under United States v. Testan, 424 U.S. 392, 400 (1976). CFC Hamlet III, slip op. at 4-6. The Court of Federal Claims then *sua sponte* examined its jurisdiction over Hamlet's cause of action and

concluded that jurisdiction was lacking under the Tucker Act. Id. at 6-8.

II.

This court reviews *de novo* a dismissal by the Court of Federal Claims for lack of subject matter jurisdiction. Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992). "The Tucker Act, of course, is itself only a jurisdictional statue; it does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 398 (1976). In order to invoke jurisdiction under the Tucker Act, a plaintiff must point to a substantive right to money damages against the United States. Id. Hamlet's complaint contained three counts, each alleging a substantive right to compensation from the United States: (1) a breach of contract claim; (2) a violation of agency regulation claim; and (3) a claim that her removal violated her constitutional rights. After examining each of these counts in turn, we conclude that the Court of Federal Claims lacked jurisdiction to hear each respective count under the Tucker Act.

III.

This court has stated that there is a "well-established principle that, absent specific legislation, federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government." Chu v. United States, 773 F.2d 1226, 1229 (Fed. Cir. 1985). In earlier proceedings in this case, we noted that under the Tucker Act, "if Hamlet's employment was by 'appointment,' a breach of contract action against the government would be precluded."

CAFC Hamlet I, 873 F.2d at 1417 n.5 (citing Hopkins, 427 U.S. at 128; Army & Air Force Exch. Serv. v. Sheehan, 456 U.S. 728, 738 (1982)). In Sheehan, the Supreme Court examined the record and the relevant agency regulations and concluded that the respondent in that case was employed by appointment, rather than by contract, and, thus, the Tucker Act did not confer jurisdiction over the respondent's contract claim against the United States for money damages. Sheehan, 456 U.S. at 735-37.

Hamlet argues that the 22-PM Manual constitutes a binding employment contract and that the Government's breach of this contract entitles her to money damages against the United States and establishes jurisdiction under the Tucker Act. We must reject this contention. Under the provision of the 22-PM Manual,[3] all ASCS county employees are employed by appointment. Paragraph 95(A) of the 22-PM Manual states that "[p]ermanent appointments shall be used for the employment of FULL-TIME or PART-TIME employees who are expected to work more than one year." In fact, the 22-PM Manual only mentions employment by contract in one provision (¶91), which states that ASCS county offices should "obtain professional janitorial services through contract." Such distinction between contract service employees and other employees strongly suggests that Hamlet and other non-janitorial employees of the ASCS county offices are employed by appointment, not by contract. *See, e.g.*, Hopkins, 427 U.S. at 128-29. Additionally, under ¶465 of the 22-PM Manual, only employees serving under appointment are eligible to participate in the Civil Service

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[3] In support of her breach of contract argument, Hamlet relies solely on various provisions of the version of the 22-PM Manual that was in effect at the time of her removal in 1985.

Retirement System (CSRS), and under ¶628, only employees serving under a permanent appointment may enroll in a federal health benefits program. The record shows that Hamlet was both covered by the CSRS and enrolled in the Federal Employees Health Benefits program.

Consequently, we hold that Hamlet's employment with the ASCS was by appointment and not by contract. Nothing in the record rebuts the presumption that a federal employee is employed by appointment and not by contract or quasi-contract. *See* Chu, 773 F.2d at 1229. Thus, Hamlet's breach of contract count does not provide for a substantive right to money damages and cannot provide for jurisdiction under the Tucker Act.

IV.

Hamlet asserts that the 22-PM Manual constitutes an enforceable agency regulation and that certain provisions of the 22-PM Manual require the United States to compensate her for her removal. We disagree.

The Supreme Court has stated that:

> [t]he basis of [a] federal claim -- whether it be the Constitution, a statute, or a regulation -- does not create a cause of action for money damages unless . . . that basis 'in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'

Testan, 424 U.S. at 401-02 (quoting Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1008-09 (Ct. Cl. 1967)).

Therefore, in order to invoke jurisdiction under the Tucker Act, Hamlet must show that (1) the 22-PM Manual was an enforceable "regulation of an executive department," *see* 28 U.S.C. §1491(a)(1); and (2) the provisions of the 22-PM Manual can be fairly interpreted to create a substantive right to monetary compensation from the United States. After examining the pertinent provisions of the 22-PM Manual and analyzing the law regarding the validity of manuals and handbooks as regulations, we conclude that the 22-PM Manual is not an enforceable regulation.

A.

The Soil Conservation and Domestic Allotment Act, Pub. L. No. 46, 49 Stat. 1148 (1935) (codified as amended at 16 U.S.C. §590h (1988)), provides for the creation and operation of the ASCS program and the ASCS county and community committees, and specifically states that "[t]he Secretary [of Agriculture] shall make such regulations as are necessary relating to the selection and exercise of the functions of the respective committees, and to the administration, through such committees, of such programs." 5 U.S.C. §590h(b). In accordance with this statute, the USDA promulgated and published regulations governing the ASCS county and community committees. *See* 7 C.F.R. §§7.01-.38 (1994). These published regulations set forth the rules for the selection and conduct of the ASCS state, county and community committees. 7 C.F.R. §§7.01-.27.

In accordance with these regulations, the ASCS created the 22-PM Manual and distributed it to all state and county offices. The 22-PM Manual provides instructions to state and county ASCS offices "on all phases of the personnel management program for County Office employees and

committee members." 22-PM Manual, ¶1. The 22-PM Manual states that it was promulgated in accordance with and under the authority of the Soil Conservation and Domestic Allotment Act and the regulations governing ASCS county and community committees. *See* 22-PM Manual, ¶7.

The provisions of the 22-PM Manual establish procedures for the hiring and classification of candidates for employment in the county offices. The 22-PM Manual also sets forth the pay schedule for county employees; eligibility requirements for pay increases; overtime, leave and severance pay policies; and the basic standards of employee conduct. The Manual also outlines the procedures and grounds for a separation of an employee for misconduct. *See* 22-PM Manual, ¶444. Before an employee can be removed, the employee must be given notice of and an opportunity to respond to a suspension action. 22-PM Manual, ¶444, 447. Only after an employee has been suspended and receives notice of removal and an opportunity to reply, can an employee then be removed. 22-PM Manual, ¶448. After a removal for misconduct, the removed employee has a right to an informal appeals hearing at the state committee, and then has a right to an appeal and a formal hearing before the Deputy Administrator of the ASCS (or a designee). 22-PM Manual, ¶¶451-53. An employee who is suspended but not yet removed may be reinstated by the county committee with the approval of the state committee, or by the state committee. 22-PM Manual, ¶454. Although this provision seems to imply that an employee cannot be reinstated once the employee is removed, other provisions show that an employee can be reinstated after removal. Paragraph 455 of the 22-PM Manual provides that an employee who is restored to duty is entitled to backpay for the period of suspension and separation and to a restoration of benefits retroactive to the

date of termination.[4] Therefore, according to the 22-PM Manual, an employee who has been separated may be reinstated and, if so, is entitled to backpay. It is this backpay provision upon which Hamlet bases her Tucker Act claim.

B.

Whether the 22-PM Manual qualifies as a "regulation of an executive department" for Tucker Act purposes is a complex question. In its decision below, the Court of Federal Claims simply held that, since the 22-PM Manual was not promulgated in accordance with the strict requirements of the Administrative Procedures Act (APA), 5 U.S.C. §522(a)(1) (1994), "it cannot be accorded the dignity of regulations." CFC Hamlet III, slip op. at 6 (quoting Hedman v. United States, 15 Cl. Ct. 304, 314 n.25 (1988), aff'd, 915 F.2d 1552 (Fed. Cir. 1990)).[5] However, the reasoning of the Court of

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[4] The pertinent part of ¶455 reads as follows:

> An employee under permanent appointment who is restored to duty . . . is eligible for backpay as follows:
>
> (1) Backpay shall be at the rate that the employee would have earned had the employee remained on the rolls.
>
> (a) Pay compensation to employee for the period of suspension and separation, minus any amount earned by the employee during the period, including unemployment compensation.

[5] The footnote relied upon by the Court of federal Claims in the present case was written in the lower court's decision in Hedman. This court, in affirming the judgment in Hedman, 15 Cl. Ct. 304, did not

Federal Claims is flawed. The APA specifically states that, for matters "related solely to the internal personnel rules and practices of an agency," an agency is not obligated to abide by the requirements of section 552, such as publication in the Federal Register. 5 U.S.C. §552(b)(2) (1994). Moreover, for "a matter relating to agency management or personnel," an agency is not obligated to abide by the notice-and-comment rule-making procedures of the APA. 5 U.S.C. §553(a)(2) (1994). Therefore, since the 22-PM Manual is a personnel manual, it does not necessarily lose its status as a regulation simply because it was not promulgated and published in accordance with the requirements of the APA.

Obviously, not every piece of paper released by an agency can be considered a regulation entitled to the force and effect of law. *See* Piccone v. United States, 407 F.2d 866, 877 (Ct. Cl. 1969) (Nichols, J., concurring); Doe v. Hampton, 566 F.2d 265, 280-81 (D.C. Cir. 1977). However, several courts have held that an agency manual or handbook can be a binding agency regulation. In Service v. Dulles, 354 U.S. 363 (1957), the Supreme Court held that an agency employee's removal was invalid because it violated the United States Department of State's Manual of Regulations and Procedures. The Court held that the unpublished manual, promulgated in accordance with the relevant executive order and statute, was binding on the Department. Id. at 374-76. Similarly, in Vitarelli v. Seaton, 359 U.S. 535, 538-40 (1959), the Court held that the Department of Interior was required to comply with the procedural standards set forth in an internal order before dismissing an employee, even though in the absence of such standards the employee could have

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discuss the status of the 22-PM Manual as a regulation. *See* Hedman v. Department of Agriculture, 915 F.2d 1552 (Fed. Cir. 1990).

been dismissed summarily. The Court treated the provisions of the informal order as "regulations." Id. at 539-540. Moreover, in Thorpe v. Housing Authority of Durham, 393 U.S. 268, 274-76 (1969), the Court held that a circular distributed by the Department of Housing and Urban Development (HUD) was binding on the Department since the circular was issued pursuant to the agency's general rule-making powers and was intended by the agency to be mandatory. The Court evaluated the circular as "an administrative regulation." Id. at 276.

In Piccone, 407 F.2d at 871-72, the court held that a government employee's removal was invalid because provisions of the Navy Civilian Personnel Instructions had been violated. In his concurrence, Judge Nichols directly confronted the issue of whether an unpublished (i.e., not promulgated under the procedures set forth in the APA) manual or document of a government agency could be considered a "regulation." He stated that "whether [any piece of paper emanating from an agency] is a regulation would seem to depend in part on its contents and in part on agency intent ascertained by extrinsic evidence." Id. at 877 (Nichols, J., concurring). Additionally, in Doe v. Hampton, 566 F.2d 265, 280-81 (D.C. Cir. 1977), the court held that provisions of the Federal Personnel Manual may be binding on the Government if the author of the manual so intended, even if the manual was not published in the Federal Register. The intent of the promulgator should be ascertained by an examination of the provision's language, its context, and any available extrinsic evidence. Id. at 281.

In contrast, other court decisions have held that a provision of a manual or handbook is not a regulation that would be binding on the Government. In Khuri v. United

States, 154 Ct. Cl. 58 (1961), the court held that provisions of the Foreign Service Manual were not binding on the Government. Although the court considered the provisions to be "regulations," the court determined that the Department of State did not intend the manual to be mandatory, but rather intended it to be a guide, setting forth general policies and principles. Id. at 64. Similarly, in Caterpillar Tractor Co. v. United States, 589 F.2d 1040, 1043 (Ct. Cl. 1978), the court held that a Department of Treasury handbook for exporters constituted "interpretive regulations" and, thus, was not binding on the Government. The court in Fiorentino v. United States, 607 F.2d 963, 968-69 (Ct. Cl. 1979), found that a provision of a HUD employee manual was not a binding regulation because it contravened a statute. In Donovan v. United States, 433 F.2d 522, 523-24 (D.C. Cir. 1970), the court determined that certain provisions of the unpublished Federal Aviation Administration employee handbook were advisory and not mandatory and, thus, not binding.

Indeed, the court has, on several occasions, stated that provisions of the Federal Personnel Manual (FPM) were not binding regulations. In Griessnauer v. Department of Energy, 754 F.2d 361, 364 (Fed. Cir. 1985), we found that a provision of the FPM, which stated that an employee's resignation "should" be by written resignation, was precatory and not mandatory. We held that this provision and similar provisions of the FPM "do not create any rights in an employee," and are not binding on the Government. Id. *See also* Collins v. Merit Sys. Protection Bd., 978 F.2d 675, 678 (Fed. Cir. 1992). Similarly, in Johnson v. Merit Systems Protection Board, 812 F.2d 705, 711 (Fed. Cir. 1987), we held that a provision of the FPM, which stated that an agency "should make every effort to take back a former employee

who was retired for disability," "merely establishes a 'policy' for agencies to follow" and "does not create any rights in the [employee]." In Horner v. Acosta, 803 F.2d 687, 694-95 (Fed. Cir. 1986), we refused to give effect to a provision of the FPM Supplement since that provision had been made obsolete by a statutory enactment. In Horner v. Jeffrey, 823 F.2d 1521, 1528-30 (Fed. Cir. 1987) (*en banc*), the court rejected the contention that a provision of the FPM Supplement, classifying service as a midshipman as "military service" for credit purposes, should be accorded the status of a regulation. The court first suggested that it was doubtful that the FPM provisions in general could achieve the status of law since the FPM provisions are "interpretive" and not substantive." Id. at 1529-30 (citing Chrysler Corp. v. Brown, 441 U.S. 281, 301-04 (1979)).[6] Looking at the specific

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[6] Since agency personnel manuals and handbooks are expressly exempt from the procedural requirements of the APA, the structural distinction in the APA, *see* 5 U.S.C. §§553(b), 553(d), between "substantive rules" and "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," as discussed in Chrysler, is not controlling. However, we think the distinction is helpful to our analysis.

In Chrysler, the Court held that, in order for an APA regulation to have the "force and effect of law," it must satisfy three requirements: (1) it must be a "substantive rule"; (2) Congress must have granted the agency authority to create such a regulation; and (3) the regulation must be promulgated in conformity with any procedural requirements imposed by Congress. 441 U.S. at 301-03. The Court noted that a "substantive rule" was a "legislative-type rule," "affecting individual rights and obligations." 441 U.S. at 302 (citing Morton v. Ruiz, 415 U.S. 199, 232, 236 (1974)). For our analysis, if a provision of an agency's personnel manual or handbook constitutes such a "substantive rule," it is far more likely to be considered a binding regulation for purposes of Tucker Act jurisdiction than if the provision were in the category of "interpretative rules, general statements of policy, or rules of agency organization,

provision in question, the court found it to be interpretive and thus not controlling. Jeffrey, 823 F.2d at 1530. Additionally, the court stated that the provision was invalid as contrary to statute. Id. at 1530-31.

In light of the foregoing, we conclude that, regardless of whether a provision of an agency's personnel manual or handbook was published or promulgated under the standards set out in the APA, such provision is a regulation entitled to the force and effect of law if (1) the promulgating agency was vested with the authority to create such a regulation; (2) the promulgating agency conformed to all procedural requirements, if any in promulgating the regulation; (3) the promulgating agency intended the provision to establish a binding rule; and (4) the provision does not contravene a statute. In determining whether a provision was intended to be binding, the court should consider (a) whether the language of the provision is mandatory or advisory; (b) whether the provision is "substantive" or "interpretive"; (c) the context in which the provision was promulgated; and (d) any other extrinsic evidence of intent.

C.

As mentioned above, the Soil Conservation and Domestic Allotment Act granted the USDA the authority to promulgate regulations relating to the selection and operation of the ASCS county and community committees. *See* 16 U.S.C. §590h. Additionally, the USDA regulations, published

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procedure, or practice." In this analysis, "substantive" includes procedural requisites in manuals or handbooks for the removal of an agency employee, such as the procedural requirements held to be binding in Service v. Dulles.

in the Code of Federal Regulations, give the Deputy Administrator of the ASCS the authority to issue official instructions and procedures to implement the provisions of the published regulations. *See* 7 C.F.R. §§7.35, 7.36. Therefore, the ASCS was vested with the authority to create the 22-PM Manual, which sets forth the instructions and procedures concerning the selection, hiring, pay, benefits, responsibilities, and removal of county and community committee members and employees.

Also, as discussed above, since the 22-PM Manual relates to matters of agency personnel, its promulgation was exempt from the strict procedural requirements found in the APA. Congress imposed no other procedural requirements for the promulgation of such an employee manual. Therefore, on the record before us, the 22-PM Manual is not infirm for reasons of its process of promulgation.

The provision of the 22-PM Manual upon which Hamlet relies is the backpay provision (¶455), reproduced in pertinent part in note 4, *supra*. That provision states that a permanent appointee who is restored to duty is eligible for backpay, and backpay "shall be at the rate that employee would have earned had the employee remained on the rolls." This language is certainly mandatory and not merely advisory. Moreover, the provision is "substantive" since it purports to create a reinstated employee's right to receive backpay. Also, the Government's own witness, Mr. Teto, the Assistant Personnel Officer for the Human Resources Management Division in ASCS, testified that the provisions of the 22-PM Manual "are the agency regulations. They are to be followed." In light of this evidence and the language and content of the backpay provision, we conclude that the ASCS intended the provision to be binding on the agency.

However, we also find that the backpay provision contravenes a congressional statue and, therefore, it cannot be an enforceable regulation. First, we note that because ASCS county employees are appointed by the county committee, which is comprised of elected members of the county's farming community, such ASCS county employees are not included within the definition of "employee" in 5 U.S.C. §2105(a) (1994). *See* Hedman v. Department of Agric., 915 F.2d 1552, 1554 (Fed. Cir. 1990). By its own terms, section 2105(a) constitutes the definition of "employee" for all of Title 5, unless otherwise specifically modified. Therefore, ASCS county employees cannot recover backpay under the Back Pay Act, 5 U.S.C. §5596 (1994), since that Act resides in Title 5 and it does not modify the definition of "employee."

Accordingly, we must infer a congressional intent to forbid backpay to this class of ASCS employees. Our reasoning follows that of the Supreme Court in Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 740-41 (1982), where the Court noted that employees of the Army and Air Force Exchange Service were explicitly excluded from the definition of employee in 5 U.S.C. §2105 and were thus precluded from bringing a cause of action under the Back Pay Act.[7] The Court stated that "Congress' intent to prohibit a backpay claim by a Service employee would obviously be subverted if the employee could sue under the Tucker Act whenever he asserted a violation of the Service's

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[7] Employees of the military exchange services are expressly excluded from the definition of "employee" for the purpose of coverage under the laws administered by the Office of Personnel Management (OPM). 5 U.S.C. §2105(c)(1) (1994). The Back Pay Act is a law administered by OPM.

regulations governing termination." Sheehan, 456 U.S. at 740-41. Although ASCS county employees are not explicitly excluded from the definition of "employee" for purposes of coverage under the Back Pay Act, they nevertheless equally fail to satisfy the definition of "employee" because they are appointed by the county executive director, who is not an "employee" within the statutory definition. Thus appointed, ASCS county employees are not "employees" under section 2105 as a matter of law. *See* Hedman, 915 F.2d at 1555. Congress obviously understood that this class of employees fall outside the definition in section 2105 because, when Congress has chosen to confer the benefits of employee status on ASCS county employees, it has done so in express terms. Id. at 1554-55 & n.1 (noting that ASCS county employees are expressly covered under certain federal programs, such as the Civil Service Retirement System and the health insurance benefits program). In view of Title 5's "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations," Bush v. Lucas, 462 U.S. 367, 388 (1983), Congress' exclusion of ASCS county employees from the Back Pay Act evidences a clear intent to preclude such employees from receiving backpay. *See* United States v. Fausto, 484 U.S. 439, 447 (1988). Therefore, we conclude that Congress deliberately chose to exclude ASCS county employees from the Back Pay Act.

Because ¶455 of the 22-PM Manual purports to give backpay to ASCS county employees who are reinstated after removal or suspension, it contravenes Congress' intent to preclude such employees from receiving backpay. Hence, under the test set forth above, this provision of the 22-PM Manual cannot be considered an enforceable "regulation of an executive department." Therefore, the provision cannot be

the basis for invoking the Tucker Act jurisdiction of the Court of Federal Claims under the rules set out in Testan.

V.

Hamlet also argues that her removal violated her rights under the First and Fifth Amendments of the Constitution. However, such constitutional claims "standing alone," i.e., without an underlying statutory or regulatory right to recovery, "cannot be interpreted to command the payment of money," and therefore cannot support the Court of Federal Claims' jurisdiction under the Tucker Act. United States v. Connolly, 716 F.2d 882, 886-87 (Fed. Cir. 1983) (*en banc*); *see also* CAFC Hamlet I, 873 F.2d at 1416-17. Since Hamlet's contract and regulatory claims are insufficient to secure Tucker Act jurisdiction, her constitutional claims alone cannot invoke such jurisdiction.

VI.

Accordingly, we hold that the Court of Federal Claims lacked jurisdiction over Hamlet's cause of action, and her action was properly dismissed. Hamlet argues that such a decision would unfairly preclude her and all ASCS employees from obtaining judicial review of adverse personnel actions. However, a former federal employee does not have an inherent right to judicial review of her removal. *See* Fausto, 484 U.S. at 448-49, 452; *see also* Carter v. Gibbs, 909 F.2d 1452, 1456-57 (Fed. Cir. 1990) (*en banc*). In Fausto, the Court held that the "integrated scheme of administrative and judicial review" in Title 5 is barred review by the Court of Federal Claims of a claim for backpay by a nonpreference member of the excepted service, despite the fact that such employees had no right to judicial review of adverse

personnel actions under Chapter 75 of Title 5. Fausto, 484 U.S. at 445, 447, 455. Hence, we cannot grant federal employees access to the courts beyond that provided in Title 5 itself. Carter, 909 F.2d at 1455-56. Hamlet is not entitled to judicial review where Congress has not granted it, and her claims must be dismissed.[8]

No costs.

AFFIRMED

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[8] Since a court may *sua sponte* question its jurisdiction at any time, we reject Hamlet's contention that the Court of Federal Claims violated the Mandate Rule and the Law of the Case doctrine.

In the United States Court of Federal Claims

No. 281-86C

(Filed: March 21, 1994)

Louise J. Hamlet,	*
Plaintiff,	*
	*
v.	*
	*
United States of America,	*
Defendant.	*

HODGES, Judge.

Plaintiff Louise J. Hamlet seeks back pay and reinstatement following her removal for violating various employment restrictions. We rule for defendant.

I.

The case was filed on May 5, 1986. Plaintiff was an employee of the Agricultural Stabilization and Conservation Service (ASCS), a part of the United States Department of Agriculture. Plaintiff was dismissed from her position following an investigation by the Inspector General of alleged violations of Department of Agriculture rules concerning political activity and conflict of interest.[1] Plaintiff pursued all avenues of appeal afforded her by ASCS and Department of Agriculture regulations before filing suit in this court. In

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[1] The factual details are set forth in Hamlet v. United States, 14 Cl. Ct. 62 (1988).

her complaint, plaintiff contended that her removal (1) violated her rights under the First and Fifth Amendments to the Constitution; (2) breached her employment contract; and (3) did not comply with the rules and regulations of the Department of Agriculture and the ASCS Personnel Policy Manual 22-PM (Rev. 1).

The Claims Court granted defendant's motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief may be granted. Hamlet v. United States, 14 Cl. Ct. 62 (1988). Plaintiff appealed, and the United States Court of Appeals for the Federal Circuit vacated that order and remanded. Hamlet v. United States, 873 F.2d 1414 (Fed. Cir. 1989). The remand was assigned to this court.

We interpreted the remand as a recommendation that plaintiff be given an opportunity to prove her case at trial. Following trial, we dismissed her case, Hamlet v. United States, No. 281-86C (Cl. Ct. Oct. 2, 1992), then denied plaintiff's motion for reconsideration. Hamlet v. United States, No. 281-86C (Fed. Cl. Dec. 18, 1992). Plaintiff appealed to the Federal Circuit, which remanded for additional findings concerning the credibility, weight, and sufficiency of the evidence adduced at trial, and whether the personnel manual is a regulation, is money-mandating, and was violated. Hamlet v. United States, No. 93-5075 (Fed. Cir. Nov. 23, 1993).

II.

In this court, plaintiff bears the burden of proof in a breach of contract action. Glasgow Assocs. v. United States, 203 Ct. Cl. 532, 539 (1974). If a plaintiff "fails to carry the burden of proof then, even in the absence of opposing

evidence, he cannot recover on the breach of contract claim." G & H Machinery Co. v. United States, 16 Cl. Ct. 568, 571 (1989) (emphasis added). Determinations of witness credibility are reserved to the discretion of the trial judge. Griessenauer v. Department of Energy, 754 F.2d 361, 364 (Fed. Cir. 1985). such determinations may not be disturbed unless they are "inherently improbable or discredited by undisputed evidence or physical fact." Hagmeyer v. Department of Treasury, 757 F.2d 1281, 1285 (Fed. Cir. 1985) (citation omitted).

Following the February 14, 1992 hearing, we permitted plaintiff to proceed on the merits of her contract claim. At the second trial on July 13, plaintiff's case-in-chief consisted of approximately one hour of plaintiff's testimony, during which she denied four of the five allegations that resulted in her termination. Defendant contended that plaintiff had failed to carry her burden and moved for dismissal. We granted defendant's Rule 52(c) motion.

Plaintiff takes the position that we are bound by her trial testimony because it was uncontested. The fact that testimony is uncontested does not compel the finder of fact to deem is dispositive. *See, e.g.* Secretary of Labor v. DeSisto, 929 F.2d 789, 797 (1st Cir. 1991) ("There is absolutely no requirement that a trial court must accept at face value any evidence before it, even if it is the only evidence on a certain issue."); Smith v. Commissioner, 800 F.2d 930, 935 (9th Cir. 1986) ("[T]he trial court is not compelled to accept even uncontroverted testimony . . .."); Sternberger v. United States, 185 Ct. Cl. 528, 535 (1968) ("The fact alone that the government presented no witnesses does not make plaintiff's evidence compelling or substantial."). Plaintiff has the burden to demonstrate both the existence of a contract and its

breach. Plaintiff received full opportunity for administrative review and, absent compelling evidence to the contrary, we may not presume bad faith on the part of the defendant. *See, e.g.,* Sanders v. United States Postal Service, 801 F.2d 1328, 1331 (Fed. Cir. 1986). Plaintiff did not carry her burden of proof, and we granted defendant's motion for judgment pursuant to Rule 52(c).

III.

A plaintiff's "asserted entitlement to money damages depends upon whether any federal statute 'can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained." United States v. Testan, 424 U.S. 392, 400 (1976) (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). Plaintiff must assert an independent statute or regulation creating either an implied or express substantive right to receive money damages. Eastport, 372 F.2d at 1008. This court has no jurisdiction to consider alleged violations of regulations that do not specifically authorize payment of money damages. Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 739 (1982). A money-mandating statute or regulation "sufficient to perfect jurisdiction must contain an express waiver of sovereign immunity." Markey v. United States, 27 Fed. Cl. 615, 621, aff'd, 11 F.3d 1072 (Fed. Cir. 1993).

In Hedman v. United States, the executive director of the ASCS sought back pay and reinstatement following his termination. The court noted that the ASCS personnel manual -- the same manual relied on by Ms. Hamlet -- was not a regulation. Hedman, 15 Cl. Ct. 304, 314 n.25 (1988), aff'd, 915 F.2d 1552 (Fed. Cir. 1990). *See also* McGrath v.

United States, 1 Cl. Ct. 236, 238 (1982), aff'd, 714 F.2d 161 (Fed. Cir. 1983) (federal personnel manual held not to be a regulation).

The Supreme Court has held that the effect of Testan could not be avoided by reliance on an appointee's internal procedural rights: "To accept this reasoning would be to undermine the Court's ruling in Testan that the Tucker Act provides a remedy only where damages claims against the United States have been authorized explicitly . . .." Sheehan, 456 U.S. at 739-40. *See also* Hayes v. United States, 20 Cl. Ct. 150 (1990), aff'd 928 F.2d 411 (Fed Cir. 1991) (Postal service personnel manual not a "regulation" under Tucker Act); Rehling v. United States, 11 Cl. Ct. 334 (1986), aff'd, 831 F.2d 305 (Fed. Cir. 1987) (Forest Service manual held not money-mandating).

The legal test to determine whether an agency manual is to be given the "force and effect of law" was articulated by the Supreme Court in Chrysler Corp. v. Brown, 441 U.S. 281 (1979). The Court held that an agency regulation must first prescribe "substantive" or "legislative" rules rather than merely "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." Chrysler, 441 U.S. at 301. Second, its promulgation must be pursuant to a specific statutory grant of authority and "must conform with any procedural requirements imposed by Congress." Id. at 302-03. *See also* Killip v. Office of Personnel Management, 991 F.2d 1564, 1569-70 (Fed. Cir. 1993) (federal personnel manual not a regulation under Chrysler test); Horner v. Jeffrey, 823 F.2d 1521, 1529 (Fed. Cir. 1987) (to be given "force and effect of law" agency regulation must meet Chrysler test).

The ASCS personnel manual fails the Chrysler test. It contains procedures for hiring and removing ASCS employees, and salary schedules for the various positions. it was not "promulgated according to the strict requirements of the Administrative Procedures Act, 5 U.S.C. §552(a)(1), [and thus] it cannot be accorded the dignity of regulations." Hedman, 15 Cl. Ct. at 314 n.25. The ASCS manual relied on by plaintiff does not contain an explicit waiver of sovereign immunity, and it cannot be "fairly interpreted" to mandate payment. The ASCS personnel policy is not a regulation, and it cannot serve as the basis for jurisdiction in this court. It does not mandate the payment of money damages for purposes of the Tucker Act.

IV.

A court may review its jurisdiction at any time. This court has inherent jurisdiction to determine its own jurisdiction *sua sponte*. Widdoss v. Secretary of Health and Human Services, 989 F.2d 1170, 1177 (Fed. Cir.), cert. denied, 114 S.Ct. 381 (1993); Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction §3522 at 69-70 (2d ed. 1984) ("[I]t is well settled that a federal court, whether trial or appellate, is obliged to notice on its own motion the want of its own jurisdiction . . .." "A court may not in any case, even in the interest of justice, extend its jurisdiction where none exists." Johns-Manville Corp. v. United States, 855 F.2d 1556, 1565 (Fed. Cir. 1988), cert. denied, 489 U.S. 1066 (1989). As a result, "[w]hen a court is without jurisdiction to hear a case, it is correspondingly without authority to decide the merits of that case." Hambusch v. United States, 857 F.2d 763, 765 (Fed. Cir. 1988), cert. denied, 490 U.S. 1054 (1989). Upon careful

review we determine that plaintiff has not established that this court has jurisdiction over her claim.

The Tucker Act gives us jurisdiction over claims based on implied-in-fact contracts. 28 U.S.C. §1491(a)(1); Ysasi v. Rivkind, 856 F.2d 1520 (Fed. Cir. 1988). An implied-in-fact contract requires a showing of the same contractual elements as those required to establish an express contract. City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990), cert. denied, 111 S.Ct. 2851 (1991). These elements are (1) mutuality of intent to contract; (2) consideration; and (3) lack of ambiguity in offer and acceptance. City of El Centro, 922 F.2d at 820; Russell Corp. v. United States, 537 F.2d 474, 482 (Ct. Cl. 1976), cert. denied, 429 U.S. 1073 (1977). When the government is a party, plaintiff must show that the government official whose conduct created the contract had actual authority to bind the government in contract. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947).

Public employment does not turn on contract theory, but is "accomplished by appointment and controlled by statute, regulation, and Executive Order." Bigler v. United States, 230 Ct. Cl. 985, 986 (1982). *See also* Chu v. United States, 773 F.2d 1226, 1229 (Fed. Cir. 1985) ("[A]bsent specific legislation, federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government."); Kanie v. United States, 650 F.2d 264, 268 (Ct. Cl.), cert. denied, 454 U.S. 895 (1981) ("[T]he rights of civilian and military public employees do not turn on contract doctrines."). Hedman held that the ASCS personnel manual "does not establish the terms and conditions of a contract because it was promulgated merely to 'instruct' State and

County offices on the appropriate procedures to be followed in office administration." Hedman, 15 Cl. Ct. at 315. Plaintiff has not established the requisite elements of an implied-in-fact contract.

V.

The First Amendment and Due Process clause of the Fifth Amendment to the Constitution do not provide relief because the alleged violation of either amendment does not mandate the payment of money damages. United States v. Connolly, 716 F.2d 882, 887 (Fed. Cir. 1983), cert. denied, 465 U.S. 1065 (1984); Testan, 424 U.S. at 400. Plaintiff's constitutional claims do not afford her jurisdiction in this court.

CONCLUSION

The Clerk will DISMISS plaintiff's complaint. No costs.

United States Court of Appeals for the Federal Circuit

93-5075

LOUISE J. HAMLET,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: November 23, 1993

Before NEWMAN, ARCHER, and MICHEL, Circuit Judges.
PER CURIAM.

In an action against the United States, Louise J. Hamlet contended that she had been wrongfully discharged from her position as a program assistant in the United States Department of Agriculture (USDA) Agricultural Stabilization and Conservation Service (ASCS) office in Charlotte County, Virginia. At trial, she presented testimony and documentary evidence that this discharge breached an implied-in-fact employment contract because it was not for good cause, and did not comply with the rules and regulations of the USDA and the ASCS Personnel Policy Manual 22-PM (Rev. 1). Thereafter, Hamlet rested. The government then moved for judgment pursuant to Rule 52(c) of the Rules of the United States Court of Federal Claims, and the court granted the government's motion, Hamlet v. United States, No. 281-86C (Oct. 2, 1992). Hamlet now appeals. Because the court's findings of fact and conclusions of law are insufficient to

enable meaningful appellate review and to comply with Rule 52(c), we vacate and remand.

DISCUSSION

Rule 52(c) requires that a judgment under the Rule "shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule." Rule 52(a) in turn requires that "the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58." In short, under Rule 52(c), "[f]indings of fact and conclusions of law must be entered to support such a judgment." 9 C. Wright & A. Miller, Federal Practice and Procedure, §2574 at 220 (Supp. 1992).[1] *See also* Oakley, Inc. v. International Tropic-Cal, Inc., 923 F.2d 167, 168 (Fed.Cir. 1991), in which we vacated and remanded a district court's grant of preliminary injunctive relief on the ground that its findings of fact were too "sparse" to permit meaningful appellate review and to comply with Rule 52(a).

Although the court entered judgment pursuant to Rule 58, it did not comply with the other requirement of Rule 52(a). A few legal conclusions can be inferred from the decision of the trial court; however, the court did not set out its view of the facts testified to by Hamlet, or recite its factual findings concerning whether Hamlet's implied-in-fact employment contract with the government had been breached. The only findings of fact stated in the opinion are that: (1) there was no evidence to suggest the State Committee

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[1] Rule 52 of the Rules of the United States Court of Federal Claims is identical in all significant respects to Rule 52 of the Federal Rules of Civil Procedure.

"merely rubber-stamped the ruling at the county level"; and (2) there was no evidence to support Hamlet's assertion that her arguments were not considered by the Committee. Hamlet, slip op. at 4. Whether the State Committee did or did not "rubber-stamp" the ruling at the county level or considered Hamlet's arguments has no relevance to whether the United States had good cause for firing Hamlet or violated applicable regulations in doing so. This is not an appeal from an action challenging the decision of the State Board, rather it is an appeal of a trial judge's decision to grant judgment pursuant to Rule 52 in an original action for violation of regulations and for breach of contract.

The opinion of the lower court does little more than announce an unexplained refusal to accept Hamlet's version of the facts. Hamlet presented evidence as to the existence of money mandating regulations governing her employment and an implied-in-fact contract of employment. She also presented testimony at trial denying all but one of the incidents cited by the firing official, and other witnesses presented testimony at an earlier trial stating that Hamlet had excellent work performance. In addition, the parties vigorously contest the legal issue of the allocation of the respective burdens of production and proof as to just cause or lack thereof. At minimum, regarding the breach of contract claim, the lower court should have made findings concerning the credibility of Hamlet and any corroborating witnesses, as well as the weight to be accorded to their testimony, whether Hamlet did or did not commit the five alleged infractions, and whether the one charge to which Hamlet admitted could itself justify removal under the appropriate burdens. All of these findings are relevant to the determination of whether there was a breach of contract as Hamlet alleges. Regarding the claim based on the alleged violation of the Manual, the lower

court should have determined: (1) whether the Manual was a regulation; (2) if so, whether it was money-mandating for purposes of the Tucker Act; and (3) if so, whether it was violated.

Because the court's findings of fact and conclusions of law are inadequate, appellate review of its decision is not possible. Accordingly, we vacate and remand for either proper findings or resumption of trial.

COSTS

Each party to bear its own costs.

United States Court of Appeals for the Federal Circuit

88-1274

LOUISE J. HAMLET,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: April 27, 1989

Before NEWMAN, ARCHER, and MICHEL, Circuit Judges.
ARCHER, Circuit Judge.

Louise J. Hamlet appeals from the judgment of the United States Claims Court, Hamlet v. United States, 14 Cl.Ct. 62 (1988), dismissing her complaint for lack of jurisdiction and for failure to state a claim upon which relief may be granted under Rule 12(b)(1) and (4), Rules of the United States Claims Court (RUSCC).[1] We vacate and remand.

I.

Hamlet was employed as a program assistant in the United States Department of Agriculture (USDA),

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[1] The Claims Court also denied Hamlet's motion to transfer the case to the United States District Court pursuant to 28 U.S.C. §1631 (1982). Hamlet, 14 Cl.Ct. at 68. Because our decision remands the case to the Claims Court, we need not consider Hamlet's appeal of this issue.

Agricultural Stabilization and C nservation Service (ASCS) office in Charlotte County, Virginia until her removal on November 4, 1985. She was not employed directly by the USDA, but was employed by a county committee founded and acting under the ASCS pursuant to 16 U.S.C. §590h (1982 & Supp. IV 1986). The parties agree that Hamlet's employment status is not governed by the general civil service provisions of Title 5 and that she is not an "employee" as defined in 5 U.S.C. §2105 (1982). Instead, Hamlet's employment is governed by the ASCS Personnel Policy Manual 22-PM (Rev. 1) attached to her complaint.

The ASCS initiated the removal action against Hamlet following an investigation by the USDA Inspector General and the determination by ASCS based on that investigation that she had violated ASCS political activity and conflict of interest restrictions. After exhausting all administrative avenues of relief without success, Hamlet filed suit in the Claims Court under the Tucker Act, 28 U.S.C. §1491(a)(1) (1982). As relevant to this appeal, she claimed that her removal (1) violated her rights under the First and Fifth Amendments to the United States Constitution, (2) breached her employment contract, and (3) did not comply with the rules and regulations of the USDA and the ASCS' Personnel Policy Manual 22-PM (Rev. 1). The relief sought included reinstatement and back pay.

The government moved to dismiss the complaint on the grounds that Hamlet had not stated a claim on which relief could be granted and that the Claims Court lacked subject matter jurisdiction. The Claims Court granted the government's motion and dismissed each of Hamlet's counts. It determined that Hamlet's claims under the First and Fifth Amendments did not provide a basis for relief under the

Tucker Act, 28 U.S.C. §1491 (1982), because she had not demonstrated that "a violation of either constitutional provision mandates the payment of compensation from the Federal Government." Hamlet, 14 Cl.Ct. at 65. The court rejected Hamlet's employment contract count holding that the Federal employment relationship is governed by statute and regulations, and that her employment with the ASCS was not by express or implied contract. Id. at 67. Finally, her regulatory count was rejected by the court on the basis that she was not an employee under the provisions of 5 U.S.C. §2105(a) (1982) and accordingly was not entitled to any relief under the Back Pay Act. Hamlet, 14 Cl.Ct. at 65-67.

II.

A. Whether the Claims Court's dismissal for want of subject matter jurisdiction under RUSCC 12(b)(1) was properly granted is a question of law. *See* Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (concerning Rule 12(b)(1) of the Federal Rules of Civil Procedure (FRCP), comparable to RUSCC 12(b)(1)); Air Prods. and Chems. v. Reichhold Chems., 755 F.2d 1559, 1562 (Fed.Cir.), cert. denied, 473 U.S. 929 (1985). To the extent jurisdictional facts are in dispute, however, the findings of fact are reviewed for clear error. *See* Reynolds v. Army and Air Force Exch. Serv., 846 F.2d 746, 747 (Fed.Cir. 1988). Dismissal because a cause of action has not been stated, *see* RUSCC 12(b)(4) and FRCP 12(b)(6), is similarly a question of law. Bell v. Hood, 327 U.S. 678, 682 (1946).[2] In passing on a motion to dismiss,

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[2] The Claims Court did not specifically indicate whether its dismissal was based on lack of jurisdiction or failure to state a claim. *See* Bell v. Hood, 327 U.S. at 682; Do-Well Machine Shop v. United States, 870 F.2d 637 (Fed.Cir. 1989). Because we vacate and remand the case

whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, unchallenged allegations of the complaint should be construed favorably to the pleader. Scheuer v. Rhodes, 416 U.S. at 236. The complaint should not be dismissed unless it is beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Under the Tucker Act, 28 U.S.C. §1491 (1982), the United States has given its limited consent to be sued in the Claims Court "upon any claim . . . founded either upon the Constitution, . . . or any regulation of an executive department, or upon any express or implied contract with the United States . . .." The Tucker Act, however, "is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 398 (1976); Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-09, 178 Ct.Cl. 599 (1967). A substantive right must be found in some other source of law, and the claimant must demonstrate that the source of substantive law he relies upon can be fairly interpreted as mandating compensation. United States v. Mitchell, 463 U.S. 206, 216-17 (1983).

B. The Claims Court's dismissal of Hamlet's claim for reinstatement and back pay based on her constitutional count was incorrect as a matter of law.[3]

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to the Claims Court on each issue, we need not consider this distinction.

[3] Hamlet's constitutional count also sought $250,000 in punitive damages in addition to back pay and reinstatement. Punitive damages for the alleged violation of Hamlet's First and Fifth Amendment rights are not available under the Tucker Act and this claim was properly dismissed by the Claims Court. United States v. Connolly, 716 F.2d 882 (Fed.Cir.

In United States v. Connolly, 716 F.2d 882, 887 (Fed.Cir. 1983) (*in banc*), cert. denied, 465 U.S. 1065 (1984), we held that "the first amendment, standing alone, cannot be . . . interpreted to command the payment of money" (emphasis added), and therefore cannot support the Claims Court's jurisdiction under the Tucker Act. The same holds true for the due process clause of the fifth amendment. Id. *See also* Inupiat Community of the Arctic Slope v. United States, 680 F.2d 122, 132, 230 Ct.Cl. 647 (1982); Myers v. United States, 231 Ct.Cl. 965, 966 (1982).

Unlike the plaintiff in Connolly, however, Hamlet's constitutional claim is not based solely on First and Fifth Amendment violations. Rather, she relies additionally upon the back pay, compensation and reinstatement rights contained in the ASCS Personnel Policy Manual which governed her employment with the ASCS. In this regard, Hamlet's claim is similar to those in Jackson v. United States, 428 F.2d 844, 192 Ct.Cl. 765 (1970), and Swaaley v. United States, 376 F.2d 857, 180 Ct.Cl. 1 (1957)[4], which were distinguished in Connolly, 716 F.2d at 887. In dismissing the constitutional count, the Claims Court did not consider whether the personnel manual provisions for back pay upon reinstatement

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1983) (*in banc*), cert. denied, 465 U.S. 1065 (1984).

[4] The Jackson and Swaaley cases involved civil service employees and, after the enactment of the Civil Service Reform Act of 1978 (CSRA), these employees may no longer seek review of their removal or demotion in the Claims Court. *See* United States v. Fausto, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988). The CSRA, however, is not fatal to Hamlet's claims under the Tucker Act because she was not employed in the civil service and her employment status was not dealt with during the reform of the civil service statutes. The reasoning in Jackson and Swaaley can therefore still be applied to Hamlet's case.

were sufficient to support Hamlet's monetary claim. Rather, its holding was predicated on the principle that First and Fifth Amendment violations alone do not mandate the payment of money. *See* Testan, 424 U.S. at 400.

C. The Claims Court also prematurely dismissed Hamlet's claim for breach of her employment contract and thereby denied her the opportunity to present evidence to establish that basis for recovery. The Claims Court agreed with the government's argument that "a federal employee has no right against the United States under an implied contract theory" and stated that the "Federal employment relationship is governed by statute and regulations". Hamlet, 14 Cl.Ct. at 67.

In United States v. Hopkins, 427 U.S. 123 (1976), the Supreme Court noted that the Federal government in that case could employ persons by contract and held that plaintiff's claim for breach of contract was sufficient, under the provisions of the Tucker Act, to withstand a motion to dismiss for lack of jurisdiction. *See also* Army & Air Force Exch. Serv. v. Sheehan, 456 U.S. 728, 739 n. 11 (1982) (distinguishing cases not involving appointment "where contracts were inferred from regulations promising payment."). We cannot say that there is no set of facts Hamlet could prove which would entitle her to relief based on her allegations that an implied-in-fact contract had been created by the personnel manual provisions covering her employment and that this contract was breached as a result of her removal.[5]

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[5] We note, however, that if Hamlet's employment was by "appointment," a breach of contract action against the government would be precluded. United States v. Hopkins, 427 U.S. at 128; Army & Air

D. Finally, the Claims Court held that Hamlet was not an "employee" duly appointed under the provisions of 5 U.S.C. §2105(a) (1982) and was therefore not entitled to compensation for an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. §5596 (1982 & Supp. V 1987). Hamlet, 14 Cl.Ct. at 65-67. Hamlet's regulatory claim, however, was not based on the Back Pay Act. Rather, her complaint indicates that her claim for back pay and reinstatement is premised solely on the ASCS personnel regulations governing her employment and appended to her complaint. The Claims Court did not address this issue in the complaint on the basis upon which it was founded. Thus, dismissal of Hamlet's regulatory claim was improper as a matter of law.

III.

For the reasons expressed, we conclude that the Claims Court improvidently dismissed Hamlet's complaint and we remand the case for further consideration or for trial. We note that the Claims Court's jurisdiction to entertain any of Hamlet's claims depends on whether or not the ASCS personnel manual provisions, upon which she relies, can properly be construed as money-mandating, a matter that was not considered by the Claims Court. United States v. Testan, 424 U.S. at 398-400; Eastport S.S. Corp. v. United States, 372 F.2d at 1007-09.

Force Exch. Serv. v. Sheehan, 456 U.S. at 738 (employment by appointment).

COSTS

Each party shall bear its own costs.

VACATED AND REMANDED

5 U.S.C. §2105 (date)

Employee

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is --

(1) appointed in the civil service by one of the following acting in an official capacity --

(A) The President;
(B) a Member of Members of Congress, or the Congress;
(C) a member of a uniformed service;
(D) an individual who is an employee under this section;
(E) the head of a Government controlled corporation; or
(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law of an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

(b) An individual employed at the United States Naval Academy in the midshipmen's laundry, the midshipmen's

tailor shop, the midshipmen's cobbler and barber shops, and the midshipmen's store, except an individual employed by the Academy dairy is deemed an employee.

(c) An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coat Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of --

(1) laws administered by the Office of Personnel Management, except --

(A) section 7204;

(B) as otherwise specifically provided in this title;

(C) the Fair Labor Standards Act of 1938;

(D) for the purpose of entering into an interchange agreement to provide for the noncompetitive movement of employees between such instrumentalities and the competitive service; or

(E) subchapter V of chapter 63, which shall be applied so as to construe references to benefit programs to refer to applicable programs for employees paid from nonappropriated funds; or

(2) subchapter I of chapter 81, chapter 84 (except to the extent specifically provided therein), and section 7902 of this title.

This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities.

(d) A Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity.

(e) Except as otherwise provided by law, an employee of the United States Postal Service or of the Postal Rate Commission is deemed not an employee for purposes of this title.

(f) For purposes of sections 1212, 1213, 1214, 1215, 1216, 1221, 1222, 2302, and 7701, employees appointed under chapter 73 or 74 of title 38 shall be employees.

28 U.S.C. §1491 (date)

Claims against United States generally; actions involving Tennessee Valley Authority

(a) (1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of an collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible

property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

Excerpt from:

ASCS Handbook
County Office Personnel Management
For State and County Offices
22-PM (Revision 1)

¶445 RESPONSIBILITY AND AUTHORITY

Authority is given to CED's, COC's, STC's and DASCO to suspend, remove, disqualify, or determine ineligibility for future ASCS service. See Exhibit 31.

A Use principles of fairness in using this authority.

B A removal or disqualification action, unless waived, is a bar to further ASCS County Office and committee service.

C See Exhibit 31 for sample letters to suspend, remove, or disqualify employee.

D See Exhibit 32 for authority to suspend, remove, and restore employees to duty.

¶446 DETERMINATIONS AND ACTION

A Review all facts available to determine whether the alleged facts are consistent with subparagraph 444B.

B Obtain complete information and determine whether the facts relating to the charges are severe enough to require removing the employee.

1 If there is a reasonable doubt about any of the charges of underlying facts, do not consider them.

2 If the facts are unclear, request OIG to make a formal investigation of the matter. Provide OIG with as much detail as possible.

C The following alternatives to removal may be available:

1 Counseling.
2 Training.
3 Improved supervision.
4 Assistance from the State Office.
5 A letter of reprimand
6 Reassignment.
7 Any combination of the alternatives in subparagraphs 1 through 6.

¶455 RESTORING BACKPAY AND BENEFITS

A An employee under regular appointment who is restored to duty, except for provisions in subparagraph B, is eligible for backpay as follows:

1 Backpay shall be at the rate that the employee would have earned had the employee remained on the rolls.

a Pay compensation to employee for the period of suspension and removal, minus any amount earned by the employee during the period, including unemployment compensation.

b Obtain a signed statement from the employee verifying the amount earned or that the employed had no earnings. File a copy of this statement in the employee's OPF.

2 DASCO may require a reduction in the amount of back salary to be granted.

a This requirement may be based on a determination that removal is not justified, but that some disciplinary action is needed.

b The reduction in backpay may be for a period of up to 6 months (13 pay periods), beginning with the date of suspension.

3 An employee who has enrolled in a health benefit plan shall have enrollment reinstated retroactive to date of termination.

a Make deductions for periods with backpay.

b Consider nonpay periods LWOP.

4 The employee shall receive credit for all other benefits just as if the employee had remained on active duty.

a Grant WGI retroactively to the due date.

b Deduct retirement from back salary.

c Deduct life insurance from back salary UNLESS there is a determination that the suspension or removal was erroneous. This provision applies to all backpay cases made on or after October 21, 1972.

5 Consider period without backpay in subparagraph 2, as LWOP, for benefit purposes.

B An employee who resigns while suspended shall not be granted backpay if STC or COC determines that the person would have been removed had the person not resigned.